No. 14114

United States
Court of Appeals
For the Ninth Circuit.

WILLIAM EDWARD FRANKS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—12-18-53

No. 14114

United States
Court of Appeals
For the Ninth Circuit.

WILLIAM EDWARD FRANKS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—12-18-53

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

J. B. TIETZ, ESQ.,
257 South Spring Street,
Los Angeles 12, California,
Attorney for Defendant and Appellant.

LLOYD H. BURKE, ESQ.,
U. S. Courthouse & Post Office Bldg.,
San Francisco 1, California,
Attorney for Plaintiff and Appellee.

In the United States District Court for the Northern District of California, Southern Division

No. 33399

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM EDWARD FRANKS,

Defendant.

INDICTMENT

(Violation. Section 12(a), Universal Military Training and Service Act, 50 U.S.C., App. 462(a)).

The Grand Jury charges:

That William Edward Franks, defendant herein, being a male citizen, of the age of 20 years, residing in the United States and under the duty to present himself for and submit to registration under the provisions of Public Law 759 of the 80th Congress, approved June 24, 1948, known as the "Selective Service Act of 1948" as amended by Public Law 51 of the 82nd Congress, approved June 19, 1951, known as the "Universal Military Training and Service Act," hereinafter called "said Act," and thereafter to comply with the rules and regulations of said Act, and having, in pursuance of said Act and the rules and regulations made pursuant thereto, become a registrant of Local Board No. 19 of the Selective Service System in Napa County, California, which said Local Board No.

19 was duly created, appointed and acting for the area of which the said defendant is a registrant, did, on or about the 3rd day of November, 1952, in the City and County of San Francisco, State and Northern District of California, knowingly fail to perform such duty, in that he, the said defendant, having theretofore been duly classified in Class I-A and having theretofore been duly ordered by his said Local Board No. 19 to report at Napa, California, on the 3rd day of November, 1952, for forwarding to an induction station for induction into the Armed Forces of the United States, and having so reported, and thereafter having been forwarded to an induction station, to wit, in the City and County of San Francisco, California, did on the 3rd day of November, 1952, in the City and County of San Francisco, State and Northern District of California, knowingly refuse to submit himself to induction and be inducted into the Armed Forces of the United States as provided in the said Act, and the rules and regulations made pursuant thereto.

A True Bill,

/s/ RUDOLPH G. ATSTULIM,
Foreman.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney.

Approved as to Form:
/s/ J.B.T.

[Endorsed]: Filed December 4, 1952.

United States District Court for the Northern District of Californa, Southern Division

No. 33399

UNITED STATES OF AMERICA,

vs.

WILLIAM EDWARD FRANKS.

JUDGMENT AND COMMITMENT

On this 4th day of August, 1953, came the attorney for the government and the defendant appeared in person and with counsel.

It is Adjudged that the defendant has been convicted upon his plea of Not Guilty and a Finding of Guilty of the offense of violation of Section 12(a), Universal Military Training and Service Act, 50 U.S.C., App. 462(a). (Defendant, William Edward Franks, did on November 3, 1952, at San Francisco, California, knowingly refuse to submit himself to induction and be inducted into the Armed Forces of the United States; said defendant had theretofore been duly classified in Class I-A and had theretofore been duly ordered by Local Board No. 19 of Selective Service System at Napa, California, to report for forwarding to an induction station, etc.), as charged in the Indictment (single count); and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Eighteen (18) Months.

Further Ordered that defendant be granted a ten (10) day stay of execution of judgment.

It is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ GEORGE B. HARRIS,
United States District Judge.

The Court recommends commitment to: an institution to be designated by the U. S. Attorney General.

C. W. CALBREATH,
Clerk.
By /s/ HOWARD F. MAGEE,
Deputy Clerk.

Examined By:

/s/ J. W. RIORDAN, JR.,
Assistant U. S. Attorney.

[Endorsed]: Filed August 7, 1953.

Entered August 7, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Appellant, William Edward Franks, resides at 2021 West Pueblo Street, Napa, California.

Appellant's Attorney, J. B. Tietz, maintains his office at 534 Douglas Building, 257 South Spring Street, Los Angeles 12, California.

The offense was failing to submit to induction, U.S.C., Title 50 App., Sec. 462, Selective Service Act, 1948, as amended.

On August 4, 1953, after a verdict of Guilty the court sentenced the appellant to eighteen months' confinement in an institution to be selected by the Attorney General.

I, J. B. Tietz, appellant's attorney, being authorized by him to perfect an appeal, do hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above stated judgment.

/s/ J. B. TIETZ,
Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 10, 1953.

The United States District Court, Northern District of California, Southern Division

No. 33399

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM EDWARD FRANKS,

Defendant.

Before: Hon. George B. Harris, Judge.

REPORTER'S TRANSCRIPT PROCEEDINGS

Appearances:

For the Government:

LLOYD H. BURKE, ESQ.,
United States Attorney, By

JOSEPH KARESH, ESQ.,
Asst. U. S. Attorney.

For the Defendant:

J. B. TIETZ, ESQ.

Friday, May 22, 1953—10:00 A.M.

The Clerk: United States of America versus William Edward Franks; United States of America versus Samuel Rueben Bippus on trial.

Mr. Tietz: Ready for both Defendants. Both are in Court, your Honor.

The Court: Have juries been regularly waived?

Mr. Tietz: Yes.

Mr. Karesh: May it please your Honor, in relation to these two cases, one is United States against Franks, No. 33399. The other is the case of United States against Bippus, No. 33400. As I indicated, there are going to be certain stipulations which will immeasurably shorten the trial.

Both indictments charge the defendants with having registered under the Universal Military Training and Service Act which amended, of course, the Selective Service Act of 1948. Both indictments charge the defendants with having been duly classified in Class 1-A, having been ordered for induction, and having at San Francisco, California, knowingly refused to submit to induction into the Armed Forces of the United States.

In relation to the case of United States versus Franks, the evidence will show that he is a registrant of Local Board [2*] 19, Selective Service System, Napa County, California; and that the date of the alleged refusal to submit to induction in San Francisco, is November 3, 1952.

The evidence will show in relation to the defendant Samuel Rueben Bippus, he is a registrant of Local Board No. 21 of Sacramento, County of Sacramento, California, and the date of the alleged refusal to knowingly submit to induction in San Francisco, California, is the 6th day of November, 1952.

There will be no dispute, may it please your Honor, in both of these cases as to whether or not

---

***Page numbering appearing at top of page of original Certified Transcript of Record.**

the defendant knowingly refused to submit himself to induction on the dates set forth in the indictment.

It is stipulated that on the dates set forth heretofore mentioned, each defendant appeared at the Induction Station in San Francisco, completed all the processes leading up to the actual induction. Each defendant was told that the step forward would constitute induction into the Armed Forces, that the name of the Service in which they would be called would be read out, and at that stage the name and the Service was called that each was to step forward and become inducted.

It is stipulated, your Honor, that the process and procedure were followed, each defendant at the point of stepping forward refused to step forward on the dates in question and be inducted into the Armed Forces of the United States. [3]

It is further stipulated that each defendant was given a second chance by appropriate Military officials to step forward and submit to induction; each defendant again refused.

Each defendant, it is stipulated, was warned of the consequences of a refusal to submit to induction, and each defendant spoke to FBI agents and likewise indicated a refusal to be inducted into the Armed Forces.

Is that the stipulation?

Mr. Tietz: So stipulated on behalf of each defendant.

Mr. Karesh: Counsel has stipulated, may it please your Honor, that the presence of the Clerk upon the witness stand may be waived and that in

each case we may offer a complete photostatic copy of the Selective Service Registration Card and Cover Sheet of each defendant in question, photostatic copies, of course, in lieu of the original file in the possession of the appropriate Selective Service officials.

At this time, your Honor, in the case of United States against William Edward Franks, we offer his complete photostatic file, and similarly of case of United States against Samuel Reuben Bippus, we likewise offer a complete photostatic file and Registration Card of this particular defendant.

Mr. Tietz: No objection.

The Court: It may be marked in evidence.

The Clerk: United States Exhibit in Case 33399 No. 1 in evidence. [4]

(Thereupon file above referred to was received in evidence and marked United States Exhibit No. 1, Case No. 33399.)

The Clerk: United States Exhibit in Case No. 33400, Exhibit No. 2 in evidence.

(Thereupon the file above referred to was received in evidence and marked United States Exhibit No. 2, Case No. 33400.)

Mr. Karesh: Might I consult with Defense Counsel?

The Court: Yes.

Mr. Tietz: May we call them both Exhibit 1 in each case? If we call them that we will keep our nomenclature correct, United States Exhibit in case 33400, No. 1 in evidence.

Mr. Karesh: And in the other case, No. 1 in evidence, too.

The Clerk: No. 1 in evidence.

(Thereupon United States Exhibit No. 2, previously identified above, was withdrawn as Exhibit No. 2 in Evidence and redesignated as Exhibit No. 1 in Evidence, Case No. 33400.)

Mr. Karesh: I think perhaps in the interest of time that counsel might make his motion, and if it has to do with any alleged procedural denial or an alleged denial on the basis in fact, we can then show to the Court, we believe, [5] that there has been no such procedural denial, nor has there been any denial of basis in fact in these classifications.

Mr. Tietz: What I had planned to do, subject to the Court's approval in each case is this: At this stage, to make a motion for judgment of acquittal, present my grounds. If I am unsuccessful I will present some evidence and then renew my motion and make some additional grounds, and the Court would have the case.

I will now make a motion for judgment of acquittal in the Franks Case. I have five principal points to present. I will go through them, either rapidly if the Court indicates that the Court doesn't care to hear any more, or has heard enough, or I will dwell as long as the Court might indicate.

The Court: Well, you proceed in your own way. I will not hasten you. You go ahead in your own way.

Mr. Tietz: The first ground is this: Exhibit 1

shows that the advisory opinion of the hearing officer was made to the Attorney General, and it was transmitted by him with a letter of recommendation to the Appeal Board which was based on an illegal reason and that the adoption in toto without any further comment by the Attorney General was also placing the matter before the Appeal Board on an illegal basis.

For the Court follow, perhaps, the facts of the case a little better, Page 40 of Exhibit 1 is the Attorney General's letter of recommendation to the Appeal Board, and Page 44 is [6] the principal page of the Hearing Officer's advisory opinion. Fortunately, in this case the Hearing Officer's advisory opinion is clear-cut. He says this registrant is a sincere, genuine man, everything about him is all right except one thing. So that we have only that one thing to consider, it is clear-cut and the question will be, in my opinion, whether that is an illegal basis and I will argue that there are two separate fallacies that make it an illegal basis.

In order to have the matter clearly before the Court at this stage I will read from Pages 43 and 44 of Exhibit 1. The Hearing Officer, after listening to the registrant, to his witness who he brought with him, reading the FBI Investigative Report says this at the end:

"The registrant is a genuie, conscientious objector, both as to combatant and non-combatant military service. On the whole, the Hearing Officer was impressed with the sincerity of the registrant;

however, the depth and maturity of his sincerity is questionable, because, in response to questions propounded by the Hearing Officer, the registrant stated that if there were no other work available, he would be willing to accept employment in a Naval shipyard.

"In the circumstances, it is felt that the registrant is not completely motivated by deep religious conviction in his professed opposition [7] to participation in war.

"Conclusion

"Predicated upon the theory expressed in the last paragraph, it is recommended that the appeal of the registrant be not sustained and that he be classified 1-A."

Not even a recommendation for non-combatant work. Now, if that is a good legal reason, then my whole point falls, but if it isn't a good legal reason, then there is a denial of due process.

I say this, start at the beginning. It is clear by the Act and by the Regulation that before a registrant can be given either one of the two conscientious objector classifications, there must be a finding of fact that he has religious training, that he has a religious belief, he believes in a Supreme Being and thus his religious training and religious beliefs are based and motivated by his relationship of these beliefs to a Supreme Being.

So, the registrant who is given the 1-AO classification is just as much, just as genuine, just as sincere and has to meet the same qualifications. And

what happens to him? He is placed into the Army uniform, he does work like binding up wounds and fitting a man to go back into battle if he is in the Medics.

If he is in the Transportation Corps he drives trucks [8] with ammunition. If he is in the Signal Corps he lays wires. He does all the things that a man in a Naval shipyard would do.

So if a man to qualify for the 1-AO must have—must be a sincere conscientious objector, then this reason is wrong. That is very briefly the point there.

Now, some courts have pointed out very clearly that when there is an illegal reason by the Hearing Officer, the whole thing falls. I will read a part of the opinion in the case of the United States of America vs. Walter Kobil, United States District Court, Eastern District of Michigan, Southern Division, Case No. 32390.

Now this, your Honor, like a number of the cases that I will be referring to—although not all—only a small portion are unreported cases. It has been my experience that while district judges are not too reluctant when they meet a legal point to quote, they are somewhat reluctant to write up opinions. That was my experience last week, I will say parenthetically, in Fresno, where two of the five I defended there were acquitted, but the Judge says, "No, I have written three opinions in the last two weeks, I am not going to write them up." So one of the quotations I give will have to be from unreported cases, but I can say this. These little slip sheets that I have were prepared by the General Counsel of

Jehovah's Witnesses. He is the man who has appeared before [8A] the Supreme Court more than any other lawyer in private practice and he is one hundred per cent reliable. There has never been any question about the exactness, and many of them have certificates of a reporter after them.

Now, here is what the Court said here. This was Judge Picard, Frank A. Picard. Here is what he said:

Mr. Karesh: May I interrupt a minute, Counsel, and ask when it was that decision was made?

Mr. Tietz: September 13th, 1951. In other words, under the 1948 Act. The 1951 Universal Military Training and Service Act didn't change the situation in any way that affects this particular point.

> "Then his case came before a Hearing Officer, Mr. Canniff, and here is what he says":

and to me this is significant. He concludes:

> "The fact that registrant originally based his claim of exemption on the ground that he was a minister of the gospel and afterwards changed his reasons for exemption maintaining he did not consider himself a minister as his faith was not strong enough clearly indicates his uncertainty and doubts about his religious beliefs."

And the Court says:

> "But that isn't true at all because a man doesn't feel that he is a minister doesn't mean that [8-B] he doesn't believe in that cause. As I

> told Counsel before you came in, I have known people who have entered the seminary to become a Catholic priest, and after they have been there they said. 'Wait a minute, I don't belong here as a Catholic priest,' and they have left the seminary and gone out and they are good Catholics."

And the Court goes on to point out that the Hearing Officer was wrong, and I say here on that one point the Hearing Officer was wrong.

The Hearing Officer was wrong legally on another point. His assumption is one that is very widely expressed. There is no basis in law for it. His assumption is this: That in order for a registrant to qualify for a conscientious objector classification he must be a pacifist. He must be willing to abstain from any force, any violence or any participation.

That isn't what the law says. The law may come to that just like the 1940 Law was written, shall I say so loosely—that isn't true, but say loosely that Judge Learned Hand in the Second Circuit was able to say in a very outstanding opinion that:

> "This man who has no religious training, no religious beliefs, in the ordinary sense he is what is called a philosophical objector. He has religion as much as most people have and thereby is within the [9] terms of the law."

So in 1948 Congress very specifically said, "Put in the Supreme Being Clause" and specifically by words it said no philosophical beliefs, no economic

grounds, some sociological grounds, no political grounds. The point I am making is they did not say you have to be a pacifist.

Just by way of illustration, in Great Britain a man can be considered a conscientious objector, and the appellate tribunal has upheld the local tribunals, when the basis for his conscientious objection has been Welsh Nationalism, Scottish Nationalism. In other words, if they found he was genuinely and sincerely a conscientious objector they felt that these other things came within it.

I am not saying we should have this here, I am saying up to this minute we don't say that a man must be a pacifist so that when the Hearing Officer bases his sole reason for this refusal upon these grounds, he made a mistake.

Now I wish to cite very briefly another District Report to the Court.

This is United States versus Everngam. Fortunately this one is reported at 102 Fed. Suppl. 128, and I will read a paragraph from Page 130.

> "The report and recommendation of the Hearing Officer denied the defendant the right to be classified as a conscientious objector because he was [10] a Catholic, and was therefore arbitrary and invalid. The Appeal Board considered this invalid report and recommendation in making his subsequent classification of defendant, in which he was denied classification as a conscientious objector and placed in Class 1-A, thereby making the classification, thereby

making the classification of the Appeal Board and the subsequent Induction Order invalid. The aribtrary report and recommendation of the Hearing Officer was a denial of due process of law."

what the Hearing Officer overlooked was that the 1940 and '48 is contrary to the 1917 law and didn't say that you have to belong to a historic peace church. It says each man shall be judged on his own basis, and the Hearing Officer probably didn't know that in the Civilian Public Service camps of World War II, where the individual who had what was then called 4-E, it is now called 1-O, the complete conscientious objector classification, the Selective Service records say that there were 162 Catholics in there. So that apparently an individual can come from a Catholic background if his own beliefs are for conscientious objection to war.

Now, your Honor, I will go to my second point. The second point is that Page 26—I believe it is—of Exhibit 1 which is the summary of the Personal Appearance Hearing of this registrant before the Board shows that their consideration [11] of the case was tainted by prejudice, tainted by a misconception of what they were to consider.

Now, when I say it was tainted by prejudice I don't mean it was so serious that they called vulgar names or anything like that, but I do say that they had ideas which didn't belong in their consideration and here is where it shows very clearly. Mr. LaRue was the Board Member that did most of the questioning.

> "Mr. LaRue: The Board must be convinced that the registrant qualifies to be classified as a conscientious objector."

So far that is a hundred per cent correct, and then he makes this statement immediately after that which shows his state of mind, and a common state of mind.

> "It is true that a Jehovah's Witness will not salute the flag of the United States?"

And the boy says:

> "That is so."

Now, what has that to do with being a conscientious objector? It has a lot to do with the attitude of the Board Member, this Board Member, and perhaps many, I can see that. Just like Judge Picard said in this very same decision. I will read a part here because it is so appropos sometimes when so many of these decisions have so many applicable points.

> "And now, the fact that this man won't salute the flag makes my blood boil; and that he won't fight [12] for his Country also makes my blood boil. But that hasn't anything to do with this, with you and me. I am the Judge; I have got to follow the law as it is in making a decision—not my natural tendencies, because he probably would have been in jail a long time ago if I had been permitted to follow my natural tendencies."

And then at the end, and I will bring it up in connection with another point, he points out that that has nothing to do with conscientious objector.

Now, the Niznik case in 184 Fed. 2d and the Kose case, both reported cases bear on that point, too. The second Niznik case in 184 Fed. 2d 972. I might state, your Honor, that if your Honor would want a memo later I will be very happy to write it up that way.

Now, my third point is a rather interesting procedural point. I meet a varied reception with these points, so I never know what appeals to any particular court. This one I have in the Court of Appeals right now.

I might say that Judge Ben Harrison first thought it was altogether all right, and then he said:

> "Well, in order to get this decided I will convict him and put him out on bail."

which is something he doesn't do. So we are up there now, unfortunately an expense to the parents. [13]

The order to report for induction—I don't have the pagination, but there is only one in this file. Selective Service Form No. 252 has a grave defect. In understanding why I say that there is a grave, and in my opinion a fatal defect, we must keep in mind the regulations.

At all times concerned—and I might say at all times, both before and after, because this is one of the few—these two regulations I am going to quote are among the few regulations that haven't been

changed. The others change very rapidly. Section 1604.59, signing official papers.

> "Official papers issued by a local board may be signed by the Clerk of the local board if he is authorized to do so by Resolution duly adopted and entered in the minutes of the meeting of the local board, provided that the Chairman or a member of the local board must sign a particular paper when specifically required to do so by the Director of Selective Service."

Section 1606.51:

> "Forms made part of Regulations. (a) All forms and revisions thereof referred to in these or any new additional regulations or in any amendments to these or such new additional regulations and all forms and revisions thereof prescribed by the Director of Selective Service shall be and become a part of these [14] regulations in the same manner as if each form, each provision therein and each revision thereof were set forth herein in full.
>
> "Whenever in any form or in any instructions printed thereon any person shall be instructed or required to perform any act in connection with such, such person is hereby charged with the duty of promptly and completely complying with said instruction or requirement."

Now, of course that was made to make the registrant do things, which is perfectly proper. The

Draft Boards must obey the law, too. Now, Section —I don't have the Section now at the moment, but I can get it—I am looking for the Section which refers to the Order to Report for Induction.

Well, I will pass on and if there is any question about it in Mr. Karesh's mind, I will dig it up in another minute. I don't know why it isn't in my notes, but that Section says this: It is one of the few sections that says anything like this, probably the only one that says it precisely like this.

> "The Order to Report for Induction shall be prepared in duplicate."

It doesn't say a carbon copy, it says: "shall be prepared in duplicate," and a duplicate copy placed in the file.

Now, the purpose for that, of course, is that the Board— [15] or in a case like this where there is a prosecution of the Government—can show that the law was complied with. I say there is a failure of proof to show that a Board Member signed the Order for Report for Induction.

Now, that is my argument in brief on that. Look at the copy in the file, the proof is offered to convict this young man and you find that it is blank. Now, those things happen, clerks are busy——

The Court: Is there any signature at all on the order?

Mr. Tietz: No, sir, there is a typewritten name underneath, underneath the line, and it says: "L. F. MacDonald"; no ink signature whatever or no handwriting, no holographic matter.

Now, my fourth point is this: That there is no basis in fact for this classification and it is arbitrary. It is elementary, the estep decision of the Supreme Court, Cox vs. United States, decision of the Supreme Court, point out there must be a basis of fact for every classification. I will take just a moment on that so there is no mistake about my point.

The draft boards of Selective Service System can't pull a classification out of a hat. They can't say: "We don't like him on general principles." They can't say, "We need to fill our quota" which, all those things may be true.

They have got to have a basis in fact. Now, it is easy enough to find a basis in fact in most cases, but I say that [16] there is no basis in fact here, and I will cite some cases which show where the Judge said to the United States Attorney:

> "Show me where there is a basis of fact for the classification here."

Now, when we look at this file, this Exhibit 1, we see that at the very first opportunity the classification question, Page 7, although paginated, I think that Page 10 file, he signed Series 14. Series 14 in brief is this: "If you are a conscientious objector sign here." He did. Then they sent him another form, elaborate form that is called, "Special Form for Conscientious Objectors." They are Selective Service Form No. 150. When you read that you will find nothing in that, in my opinion, that would justify refusing him the 4-E, and certainly nothing

to refuse him the 1-AO. Nothing to show there: "You are a 1-A." You will find in the file that 32 people signed an affidavit in his behalf. You will find that all his letters ring true. And I say there will be nothing whatever against him in the file except that one point, that the Hearing Officer—remember, this is long after the local board classification, and my statement right now is that there is a great many cases that hold that a registrant is entitled to due process of law, to fair treatment at every level of the Selective Service System.

Long before the Hearing Officer dug up the point which may or may not be a point—I say it isn't—that he would [17] work in a Naval shipyard, there was no basis in fact. They just arbitrarily decided against him.

Now, with the Court's permission, I will read a paragraph from another unreported case, the Konidess case. This was United States of America vs. Stephen Konidess in the United States District Court of New Hampshire, Criminal Number 6216, decided at Concord, March 12th, 1952. The Judge was John C. Clifford, Jr. The Court said:

> "It is not the duty of this Court, as already indicated by me, to weigh the evidence as the cases are being presented in novo. The defendant has been consistent throughout in his claim that he is a conscientious objector, objecting to both combatant and non-combatant service. He has supported his position in this respect with facts presented to the local draft board, and

> which facts constituted the findings of fact by the Hearing Officer in his report. There is nothing in that report that indicates that the claim of the defendant——"

here is where we part a little bit——

> "There is nothing in that report that indicates that the claim of the defendant as a conscientious objector to combatant service as well as non-combatant service is false.
>
> "Although there is nothing in the reports of the [18] local board and Hearing Officer to indicate findings contrary to the contention and the facts as set forth by the defendant, the local board nevertheless classified him as 1-AO thereby rejecting the defendant's claim with respect to non-combatant service as indicated.
>
> "It is the conclusion of this Court that the Government has not sustained its burden in proving the guilt of this defendant as charged in the indictment."

Now, another much shorter paragraph in the Kobil case that I have mentioned before and I will be through with this point. This brings in a very nice distinction and very parallel to what we have here.

> "This young man couldn't qualify as a minister, under the Regulations of Congress."

And I admit that is true here. This young Jehovah Witness couldn't qualify as a minuister. He could

qualify as a minister in the Jehovah's Witnesses, but that isn't enough and for the purpose of this argument I will concede that.

The Court goes on to say:

> "I have searched this record. I have asked counsel to point out to me one thing the Board had before it besides the natural prejudices and its capricious manner which I can understand, too, being of the type I am. It is very difficult for me to tell you what [19] I think you ought to do and must do, but it was absolutely without any basis in fact and there was no right for this draft board to classify him as 1-A. What they should have done, in my opinion, is to make further inquiry that gives them that right."

Now, it is true, your Honor—your Honor probably has a number of these matters and you know that the Selective Service System hasn't waked up to the fact that if they bring these young men as they have a right to and without counsel, and by putting questions to them they can corner them on certain things about use of force, self-defense which may be a basis perhaps; certainly it gives them a debatable basis, but that wasn't the fact in this case.

My sixth point is this, and I merely state this point for the record because unfortunately the Court isn't in any position to rule on this matter. My point is what I will call the Nugent case point, that this file shows an absence in it of the Federal

Bureau of Investigation investigative report, and so that the Court will understand why I said that, your Honor—why I said that your Honor isn't in a position to rule on it, I will state this very briefly, then I will be through with my whole argument upon this one motion.

In the Second Circuit the conviction of a boy named Nugent was reversed on the point that his file didn't have in it the FBI investigative report. The Government sat certiorari, it was admitted and it was argued to the Supreme [20] Court on May 4th.

While that was going on I seized on that in a case that I had called the Elder case, which is now not unreported, but it is in the advance sheets and this Court, Ninth Circuit, said although appellant didn't even hint of this point during the course of the trial, we think in fairness because of the present posture of the case we will consider it. And then they said:

"We disagree with the Second Circuit,"

so I am merely stating this for the record.

Your Honor, I fear, isn't in a position to rule on that particular point, but I, of course, am hopeful that the Supreme Court will affirm the Nugent Case.

Mr. Karesh: May it please the Court, as your Honor knows, your Honor is very familiar with this type of case. The defendant is not entitled to an acquittal unless there is shown to be some substantial denial of due process. I think the late Judge

St. Sure said that he would have to be deprived of a substantial Constitutional right. He said it in the Habeas Corpus case of Colt vs. Hoyle.

Now, if there is no basis in fact whatsoever, of course, the 1-A classification is invalid and induction order predicated thereon is void and the man would be under no obligation to comply with the order of induction.

We will show that there is a basis in fact where this [21] particular case for this classification accorded to the registrant. So far as the denial of the procedure of due process is concerned, if a man were denied a personal appearance, for example, that would constitute a denial of procedural due process; or if, for example, a man had a personal appearance and said something different than that which had heretofore been furnished in his file and a summary did not go to the Appeal Board, that might be considered a procedural denial; or a man was not permitted an appeal.

But under every other circumstance, if there is any absence of certain procedures, it cannot be said to constitute a denial of procedural due process.

For example, the argument that the failure to place the name of the Chairman or member of the Board on the duplicate order would constitute a substantial prejudice seems to me would be to exhalt a technicality to a Constitutional level.

Now, I recall in a case before his Honor, Judge Carter, on a Habeas Corpus case arising in these courts, counsel said that the failure of the classifi-

cation card to show the signature of a board member invalidated the classification. Judge Carter brushed that aside. I can't understand the distinction between a carbon copy and a duplicate. In my opinion —maybe I am wrong, but a duplicate is a carbon copy, but so far as that is concerned, your Honor, I don't believe we have to labor the point at all. [22]

I would call your Honor's attention to the fact that the burden is not upon the Government to show that the defendant is not entitled to his classification. The burden is upon the registrant.

Draft boards are not in the nature of courts of law. There is a presumption first of regularity in their actions, and as the Regulation says, your Honor, in Class 1-A shall be placed every registrant who has failed to establish to the satisfaction of the local board, subject to appeal hereinafter provided that he is eligible for classification in another class. So the burden is upon him.

While this is a criminal trial, nonetheless, the burden is upon him so far as the L-A classification is concerned to show that he was entitled to a classification other than that. Now, all we have to do, if your Honor please, is to have some basis in fact and counsel challenges the so-called basis in fact which we will show now exists.

What is the basis in fact?

One: A man who is willing to work in a shipyard to create the instrumentalities of war certainly is not conscientiously opposed to participation in war in any form. Any man who is willing to work in a shipyard and get paid for creating the instrumen-

talities of war is not entitled to a conscientious objector classification.

A man in a conscientious objector classification, according [23] to the regulations, must be conscientiously opposed to participation in war in any form. I am not speaking of the 1-AO. I am speaking of the 4-E, now the 1-O, and I reiterate and I emphasize, any person willing to work in a shipyard and create the instrumentalities of war is not entitled to that classification.

Now, counsel, in effect, conceded that if we could show the man would use force in one form or another that that might constitute a basis in fact, and he says, "You can't find it." He alludes to the hearing before the local board, and nowhere there does the registrant say that he would use force. However, counsel forgets that in the conscientious objector form which the registrant filled out and which was before the local board as well as before the Board of Appeal—and this is now Photostatic No. 14 of the C.O. Form, it says:

> "Under what circumstances, if any, do you believe in the use of force?"

And he says:

> "I believe in self-defense if anyone attacks me to do bodily harm."

All right, now there is a judge in Minnesota—I think it is in Minnesota, United States versus Camp, I think, is the case and I can present it, said that if anybody is willing to use force of any kind

he is not conscientiously opposed to participation in war in any form. [24]

Now we come to the question of the prejudice of the local board. I say that if you read the hearing before the local board, quite the contrary, that hearing doesn't disclose any prejudice whatsoever. Now, in relation to the 1-AO classification, it must be remembered that the registrant told the local board that he didn't want it anyway, he wouldn't accept it. The local board had before it, "Shall we give him the 4-E now, the 1-O, or shall we place him in 1-A?" At that time they had seen the person—and, your Honor, they could look at the person if they wanted to; they could judge him; they could decide whether he was or was not sincere. They could pass upon his credibility.

Well, the local board said, "We will put you in 1-A." Now counsel says that the local board was prejudiced and he infers that if the local board was prejudiced, regardless of what happened before the Board of Appeal, that would invalidate the classification and recites the Niznik case. This Circuit Court very wisely isn't paying any attention to the Niznik case.

There is the case of Tyrrell vs. United States affirming a judgment which was rendered before his Honor Judge Roche in which they said—this Court said and reiterated a previous finding that when you have an appeal board decision anything that went on before the local board is immaterial. It is obvious, your Honor, why we have appeal

boards for [25] situations such as counsel says exist here, but I would add there isn't any prejudice before the local board and there wasn't or isn't any prejudice before the Board of Appeal.

Now, Counsel says that the Hearing Officer made some mistake; he made an error—I think he said an error in law and therefore that tainted the subsequent decision of the Board of Appeal. Why, as your Honor knows, the decision or the finding of the Hearing Officer is merely advisory. It is not mandatory.

Even if he made a mistake, there is nothing here to show that the Board of Appeal made a mistake. All we do is look in the file and say, "(One) Is there a basis in fact?" Obviously there is the basis in fact, the shipyard and the use of force to defend himself personally.

Was there any procedural due process denied the registrant? Obviously not. We come to the last point, the question of the FBI report in the file.

Counsel has cited the Elder case. The Elder case —and this is the law in this Circuit until the Supreme Court overrules it, and I don't think it will—at least I am hopeful it will not, your Honor. The FBI report, according to the Elder case, does not have to be in the file. Therefore, on the basis of this file and on the basis of the evidence here we ask that that motion be denied.

Mr. Tietz: If I may be permitted a few moments to reply [26] to Mr. Karesh, I promise the Court I will try not to repeat myself in anything we go

into later. I will take up the points in reverse order while they are fresh in my mind.

Mr. Karesh made a point that the advisory recommendation of the Hearing Officer and the recommendation of the Attorney General are merely recommendations and that they are not binding on the Appeal Board. That is true. Here's how the Court in the Everngam case previously cited disposed of that matter, and I think it is very good. There are other cases, too, on it.

This is on Page 131:

> "It does not appear that any member of the Appeal Board felt himself bound by this report and recommendation, or how far, if at all, it influenced the decision of the Appeal Board, but that is not enough. The report and recommendation was transmitted to the Appeal Board to use as an advisory opinion, and was considered and used (as the Regulations require) by the Appeal Board in its subsequent classification of the Appeal Board. Under such circumstances the prosecution was bound to prove that such invalid report and recommendation of the Hearing Officer of the Department of Justice did not affect the decision of the Appeal Board or any subsequent decision of the local board. No such [27] proof was offered. And had such proof been offered, there is considerable doubt whether such proof would have cured the error, inasmuch as the Report and recommendation of the Department of Justice

> is an important and integral step in the conscription process, for the protection of the registrant, as well as the Government."

Now, Mr. Karesh would have the Court to understand that I conceded, or substantially conceded, that the use of force would be a basis of fact. I respectfully say to the Court that I intended and made no such concession.

As a matter of fact, I argued at some length that pacifism was not a requirement for either of the two conscientious objector classifications, that a man could be like a Jehovah Witness, a fighter. They are not pacificists. If they are assaulted they will strike back, as you and I would. They are conscientious objectors on another religious basis, not as the Christodelphians and the Mennonites and Quakers and all the peace churches, besides 120 some other churches who have had these problems in their ranks. These others are Pacifists, but Jehovah's Witnesses are not and they don't have to be. The law doesn't require it, and perhaps never will.

Now a quotation of the late Judge St. Sure about a substantial constitutional right overlooks a point —maybe I [28] am just quibbling about words, but I want to make it clear that not only must there be a denial of constitutional due process—I will put it this way: A defendant doesn't have to show a denial of constitutional due process. He can show a denial of statutory due process. He can show a

denial of procedural due process, and that is what I think we have done.

Mr. Karesh: May I just say this——

The Court: Have you submitted your motion?

Mr. Tietz: The first motion, yes.

Mr. Karesh: I simply wish to say, your Honor, that in the pamphlets Jehovah's Witnesses will engage in what they call theocratic causes. In other words, what they call a War for God so they are not entitled to a conscientious objection.

The Court: The motion at this stage will be denied. These motions are applicable to both cases, are they?

Mr. Tietz: I wouldn't want to say that, your Honor, but I will say this: My mind isn't working that clearly now, but if in the next case any of these motions apply precisely, I will not take the Court's time except possibly for this, to point out that the facts may be different and stronger.

The Court: I will not foreclose you from that opportunity. We will take a short recess.

(Short recess.) [29]

Mr. Tietz: The defendant will take the stand.

WILLIAM EDWARD FRANKS

the defendant, called as a witness on his own behalf, sworn.

The Clerk: Please state your name, address and occupation to the Court.

A. My name is William Edward Franks. I live at 2021 West Pueblo, Napa, California.

(Testimony of William Edward Franks.)

Q. Your occupation?

A. Boilermaker's helper at Basalt Rock.

Direct Examination

By Mr. Tietz:

Q. You are the defendant in this case?

A. Yes.

Q. You had a personal appearance before the local board on or about July 10, 1951?

A. Yes.

The Court: Give the number of the board, please, for the record.

Mr. Karesh: 19, isn't it?

Mr. Tietz: Board number 19.

A. Yes.

Q. Where is that board? A. Napa.

Q. When you appeared at that board for a personal appearance therein, did you have an attorney with you? [30] A. No, I never did.

Q. What are your beliefs on conscientious objection?

A. Well, my belief on conscientious objection is that as Corinthians, the first, second chapter, in the tenth verse—tenth chapter, rather, the third and fourth verses, states plainly that although we walk in the flesh we do not war in the flesh because our warfare is not carnal. Also in second Timothy, in the second chapter, and in the third and fourth verses, it states that we should be a good soldier for Christ's army and all of those that are engaged,

(Testimony of William Edward Franks.)

have made their dedication to Jehovah God to do his will, are in Christ's army and they will do his will to preach to the people of good will not to wage warfare of the flesh and kill, as the Bible states and commands all men not to do.

Q. You saw the part of Government's Exhibit 1, pages 43, 44, otherwise known as the hearing officer's report, did you not? A. I did.

Q. It states in there that you told him you would work in a naval shipyard; it states that, doesn't it? The hearing officer's report says you told him you would be willing to work in a naval shipyard?

A. That is what it says.

Q. What is the fact, what happened at the [31] hearing?

A. Well, the fact is that at the hearing I told him that I would work at a shipyard if it was not directly to warfare, and then he jumps to the conclusion or it was his misunderstanding that it would be a naval shipyard, whereas I said it would be a shipyard if it was not directly to warfare.

Q. At this personal appearance before the local board, which was, I believe, on July the 10th, 1951, did you come to that hearing with somebody to testify for you? A. I did.

Q. Who was that?

A. My brother-in-law, Everett Boerger.

Q. Was he permitted to enter and to speak or to testify on your behalf? A. No, he was not.

Q. Is he in Court today? A. Yes, he is.

Mr. Tietz: That is all. You may cross-examine.

(Testimony of William Edward Franks.)

Cross-Examination

By Mr. Karesh:

Q. Have you any idea what kind of shipyard would not be related to the war effort?

A. Well, not particularly, no. Any shipyard that would be building regular cargo ships or a ship that would be used as a little yacht or some nature of that sort.

Q. I think you said in your conscientious objector form [32] that you would use force to defend yourself, is that correct? A. Yes, I did.

Q. Would you use force to defend anybody else?

A. Only my family, if someone was breaking in my home.

Q. You would defend your family?

A. Yes. We have Bible help on that.

Q. What about somebody else's family?

A. Well, particularly, like a neighbor or something like that, no.

Q. You would defend yourself and your family against, personally, an attack? A. Yes.

Q. Would you defend another person's family against personal attack? A. No.

Q. Well, don't you consider it a higher form of religion to help others rather than to help yourself?

A. It is to help them with their belief and their understanding of the Bible and for God's purposes.

Q. Do you believe in going into what is called theocratic warfare, do you not?

(Testimony of William Edward Franks.)

A. That's right.

Q. That's the belief of Jehovah's Witnesses?

A. That's right. [33]

Q. And the pamphlet that you submitted to the local board, I think, contains that fact, does it not?

A. It does.

Q. What do you mean by theocratic warfare?

A. Theocratic warfare is not the warfare of a gun or of any nature to kill anyone. It goes to the nature of God's word, the Bible. It is theocratic warfare to the extent they tear down the things that the devil has put upon this earth and showing by the Bible that they are wrong and that God's Kingdom will be established for man's only hope.

Q. So you would engage in some kind of warfare if you believe it were God's warfare?

A. It would be preaching God's warfare, yes.

Mr. Karesh: That is all.

Mr. Tietz: That is all.

(Witness excused.)

EVERETT BOERGER

called as a witness for the defendant, sworn.

The Clerk: State your name, your address and your occupation to the Court.

A. Everett Boerger.

Q. Your address?

A. 1405 Vista Avenue, Napa. [34]

Q. Your occupation? A. Operator.

Q. What kind of operator?

A. Equipment operator.

(Testimony of Everett Boerger.)

Direct Examination

By Mr. Tietz:

Q. Do you know the defendant, William Franks? A. I do.

Q. How long and how well have you known him?

A. Well, I have known him since 1939 and '40 when I became acquainted with his sister.

Q. Have you had occasion to be with him much in the last ten or so years, twelve years?

A. All the time.

Q. Well, do you attend Bible studies and such things with him?

A. Yes. I attend two Bible classes a week with him and one Bible class we do not attend together inasmuch as he conducts one Bible study and I conduct the other in different places.

Q. Do you know the difficulty he had in the public schools about the flag salute?

A. Yes. He was expelled from a number of schools in the City of Napa and had to go from one to another to be permitted to go to school. [35]

Q. You know that he has been a staunch Jehovah Witness for many, many years?

The Court: How many years?

Q. (By Mr. Tietz): How many years has be been a member?

The Court: To his knowledge.

A. I became acquainted with the work in 1939 and he was then in 1940 expelled from school and has been ever since——

(Testimony of Everett Boerger.)

Q. (By Mr. Tietz): Because of his belief as a Jehovah Witness in the flag salute situation?

A. That's right.

Q. That goes back at least to that, is that right?

A. Yes.

Q. Do you know of other work besides conducting and attending Bible studies that this defendant has done in connection with his religious work?

A. He conducts Bible studies and he has enrolled in the Theocratic Ministry school.

Q. What does that mean?

A. Where we learn to become more able and efficient in presenting the gospel of the good news to the people throughout the earth, being better trained to go forth.

Q. What classes or what time does that take?

A. At Napa we hold the Theocratic Ministry school every Thursday evening, and it consists of an hour each week. [36]

Q. Is that in addition to these Bible studies that you mentioned? A. Yes.

Q. In other words, it is in addition to the Bible studies? A. That's correct.

Q. Do you know of any work that Bill has done in publishing? A. Yes.

Q. What does that mean, publishing?

A. Publishing means to go from door to door preaching, as we are commanded, and he has participated in that each week.

Q. That in addition to all these other things?

A. Yes, that's right.

(Testimony of Everett Boerger.)

Q. Do you know whether he does it regularly or just once in awhile?

A. Yes, he does it regularly.

Q. When you say regularly, do you mean every week of the year? A. Every week, yes.

Q. About how many hours every week, in addition to these other things that he does?

A. A week?

Q. Each week.

A. Each week on the average of—well, I would say, well, it would be 20 hours a month—about five hours a week. [37]

Q. I believe you served four years at Steilacoom as a Jehovah Witness, is that right? A. I did.

Q. Have you ever discussed conscientious objection with this defendant here today?

A. Yes, we have talked about it.

Q. Often?

A. Well, not often, but we discussed it to thoroughly understand how each of us felt.

Q. Do you know how he feels about it?

A. Yes.

Q. Now all these things I have been asking you about, are these the things that you were prepared to tell the local board at this personal appearance hearing on July 10, 1951, if you had been permitted to come in and tell them what you knew about him?

A. Yes.

Mr. Tietz: You may cross-examine.

(Testimony of Everett Boerger.)

Cross-Examination

By Mr. Karesh:

Q. The Jehovah Witnesses is not a pacifist organization, is it? A. No.

Q. The Jehovah Witnesses sect has no prohibition against a person going to war if that person wants to go to war?

A. It is his own personal—— [38]

Q. It is his own conscience? A. Yes, sir.

Mr. Karesh: That is all.

Mr. Tietz: That is all. One further question.

Redirect Examination

By Mr. Tietz:

Q. If one of the Jehovah Witnesses either enlisted or permitted himself to be drafted into any national army, secular army, worldly army, would he still be one of Jehovah Witnesses?

A. It would be entirely up to the individual himself.

Q. You mean that he could engage in carnal warfare and still be a devout and a follower of Jehovah Witnesses? A. No.

Mr. Tietz: That is all. Thank you.

Mr. Karesh: No questions.

The Court: I would like to ask a couple of questions.

Examination

By the Court:

Q. In the light of your earlier testimony con-

(Testimony of Everett Boerger.)

cerning the fact that a person, although a Jehovah Witness, would undertake to serve the armed forces as a matter of his own personal concept——

A. Yes.

Q. ——mindful that you said "yes," how do you reconcile your last statement that if he did enter the services it would be inimicable as a Witness, how do you reconcile [39] those two statements?

A. He couldn't conduct himself in it, according to the scriptures, if he carried on a part with the world. He has to make a decision as to whether he is going to serve the Creator or serve in the armies of the nations.

Q. Within the areas of your own organization, there is no proscription—I mean by that, no prohibition against the individual exercising his own judgment as to the entry into the armed services, is there? A. No.

Q. And there is no mandate upon the part of any higher authority which might be exercised upon the individual, is there, in that respect—no mandate, no compulsion from any higher authority from within the Witnesses themselves? A. None.

Q. So, as I understand your testimony then, the individual looks upon the problem of the entry into the armed services as a specific individual problem?

A. That's right.

Q. Disassociated from the question of his activities in this religious sect, am I correct in that?

A. Yes.

The Court: I think I understand. Thank you, very much.

(Witness excused.) [40]

Mr. Tietz: Now, your Honor, I think Mr. Karesh and I have an understanding on a final point, that it was not necessary for me to issue a subpoena to the agent in charge of the Federal Bureau of Investigation office, and I believe Mr. Karesh has all the F.B.I. investigative reports made of this defendant, William Franks, with respect to his conscientious objection to war; that these are the reports that were given to the hearing officer of the Department of Justice for his use, and that they were used by him; that they are not in his file; and that we had no opportunity to know the informants or the exact statements that they made; that they did have an opportunity to have a general character given but not the names of the informants.

Now, Mr. Karesh, that is our understanding, is it not?

Mr. Karesh: Yes. I gave counsel the understanding that rather for him to go to the trouble of issuing a subpoena for the files, I would have them, but I told counsel in my letter, and I think he will bear me out, that the mere production, to obviate him going to the trouble of getting a subpoena for the production of those reports, we would vigorously resist. Now, if he is prepared to make the demand, I will be prepared to argue why we should not produce them.

Mr. Tietz: Yes, we are asking that they be admitted in evidence. That they be first marked so that we will know [41] just what we are talking about.

Mr. Karesh: No, I am not required to ask that they be marked for identification.

Mr. Tietz: Well, I want to be able to talk about the precise thing. You have them here, have you not?

Mr. Karesh: I may have them here, yes. I said I would have them here, but I feel I don't have to produce them under the authority in the Elder, Elder versus the United States. I will leave the decision to your Honor. This is the law of this Circuit.

Mr. Tietz: That is of a different point, your Honor.

The Court: Why not make your record on the point first, so that I can focus my attention on the point?

Mr. Tietz: I am no longer arguing the Elder point, which is the Nugent point.

(Further argument presented.)

The Court: Now, I have several matters to rule on. I have the matter of the production of the F.B.I. report and file.

Mr. Karesh: Under instructions, we can't produce them, Judge.

The Court: You enter an objection to the request?

Mr. Karesh: Yes.

The Court: The Court rules on the objection and sustains the objection. [42]

What are the other matters before me to rule upon?

Mr. Tietz: I would like to cite two matters that are right in point with the matter that the Court has been discussing with Mr. Karesh. In this Cobell case, Judge Prickard had this to say (citing). Now another Court took the same attitude and that's Judge Joyce, in the Greason case. This is United States District Court, District of Minnesota, decided in Minneapolis, November the 30th, 1951 (citing).

(Further argument.)

The Court: I will permit you to file a memorandum, counsel, of authorities.

(Further discussion between the Court and counsel.)

The Court: Is the record now in such condition, gentlemen, that these points may be reviewed? Are your points thoroughly noted in the record, counsel?

Mr. Tietz: I will state this for the purpose of the record, on behalf of the defendant Franks, I repeat, as if I fully stated again, the five grounds for a judgment of acquittal——

The Court: You might repeat them for the record, just in summary form.

Mr. Tietz: The hearing officer advisory opinion and the attorney general's recommendation was based on illegal reasoning. [43]

Point number 2 was the summary of the personal appearance hearings shows that prejudicial attitude on the part of the board.

Point number 3 is that there is a defect in the proof in that the duplicate that is in the file in Exhibit 1 of the order to report for induction, Selective Service Form 252, is a blank. It is unsigned.

The fourth point was and is that there is no basis in fact for the classification. It was arbitrary.

The fifth point is that the file shows that there is no—that the F.B.I. Investigative Report is not in it.

The Court: I ruled on the last point.

Mr. Tietz: Yes, sir.

Now, the points that I have made at the present time are as follows: The hearing officer's report is factually incorrect in that the hearing officer said that he said he worked or would work in a naval shipyard and the testimony, uncontradicted, is that he said he would work in a shipyard but not a naval shipyard. And on the basis of the Leland case, which is a recent Ninth Circuit Case, the court there pointed out that it goes without saying that a hearing officer's opinion can be factually incorrect and therefore it can be—it can vitiate the proceedings.

The next point was that the local board refused to hear [44] his sole witness, Everett Boerger, who had further evidence to present, evidence not in the file.

And the next point and last point, was that the defendant believes he should have the advantage of

the F.B.I. investigative report in the presentation of his defense here in a criminal proceedings.

The Court: Then the case of United States versus William Franks is submitted.

[Endorsed]: Filed November 2, 1953. [45]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Attorney for the appellant:

Indictment.

Waiver of Jury Trial.

Order Denying Motion for Judgment of Acquittal.

Judgment and Commitment.

Notice of Appeal.

Extension of Time.

Designation of Record.

1 Volume of Testimony.

Plaintiff's Exhibit No. 1.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 2nd day of November, A.D. 1953.

[Seal] C. W. CALBREATH,
Clerk;
By /s/ C. M. TAYLOR,
Deputy Clerk.

[Endorsed]: No. 14114. United States Court of Appeals for the Ninth Circuit. William Edward Franks, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed November 2, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14114

WILLIAM EDWARD FRANKS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Appellant will rely upon the following points in the prosecution of his appeal from the judgment entered in the above-entitled cause.

I.

The classification on the appellate level was based on misconceptions of the law, namely, that only pacifists can qualify for conscientious objector classifications and that a willingness to work in a naval shipyard disqualifies a registrant for a I-A-O classification.

II.

Prejudice and/or ignorance of the law colored the classification action at the local board level.

III.

The classification action at all levels was without basis of fact.

IV.

Appellant should have been permitted a de novo trial of all issues.

V.

The uncontradicted evidence shows there is no factual foundation for believing that appellant is or ever was willing to work in a naval shipyard.

VI.

New and further pertinent evidence was available at the local board hearing but the board arbitrarily refused admission to the witness, Everett Boerger.

VII.

The court erred in refusing admission of the F.B.I. reports, or permitting the defendant to inspect them.

/s/ J. B. TIETZ,
Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 9, 1953.